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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-221

PEGGY J. CONNOR, ET AL., *Appellants,*

v.

JOHN BELL WILLIAMS, Governor of the State of Mississippi, ET AL., *Appellees.*

On Appeal from the United States District Court for the Southern District of Mississippi (Three-Judge Court)

JURISDICTIONAL STATEMENT

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On Appeal from the United States District Court for the Southern District of Mississippi (Three-Judge Court)

JURISDICTIONAL STATEMENT

OPINIONS BELOW

This appeal involves the reapportionment of the two houses of the Mississippi State Legislature. The opinion of the district court, entered on May 18, 1971, and amended on May 21, 1971, is unreported. It is reprinted herein as Appendices A and B. Emergency relief pending appeal was granted by this Court on

June 3, 1971, 402 U.S. 690, and a subsequent application was denied on June 21, 1971, 403 U.S. 928.

Opinions in this case relating to prior reapportionment of the State Legislature are reported at 256 F. Supp. 962 (S.D. Miss. 1966), and 265 F. Supp. 492 (S.D. Miss. 1967). Neither of these judgments was appealed.

An opinion in this case relating to prior redistricting of the Congressional districts is reported at 279 F. Supp. 619 (S.D. Miss. 1966), *aff'd*, 386 U.S. 483 (1967). Congressional districting is not involved in this appeal, new district lines not yet having been drawn since the 1970 Census.[1] All earlier proceedings have been styled *Connor* v. *Johnson*.

JURISDICTION

1. This action was initially filed October 19, 1965, in the United States District Court, Southern District of Mississippi, by eight black individual plaintiffs and an unincorporated association, the Mississippi Freedom Democratic Party, against the members of the Mississippi State Board of Election Commissioners and the presiding officers of the Mississippi House of Representatives and the Mississippi Senate. The complaint sought reapportionment of the Mississippi Legislature and redistricting of the Congressional election districts. Jurisdiction was based on 28 U.S.C. §§ 1343, 2201 and 2202, 28 U.S.C. §§ 2281, *et seq.*, and 42 U.S.C. §§ 1983 and 1988, and article IV, section 4 and the fourteenth and fifteenth amendments to the United States Consti-

[1] The district court mistakenly assumed that its earlier state legislative plan, not the Congressional district plan, had been affirmed by this Court. Appendix 1a, 5a.

tution. The judgment now appealed from was entered on a reapportionment plan submitted by the State on March 23, 1971, pursuant to jurisdiction retained by the district court following its judgments in earlier reapportionment plans in 1966 and 1967.

2. The judgment or decree sought to be reviewed is dated and filed May 18, 1971, and amended by order dated May 21, 1971, filed May 22, 1971. Notice of Appeal was filed May 24, 1971.

3. Jurisdiction of this appeal is conferred by 28 U.S.C. § 1253.

4. The following cases sustain the jurisdiction of this Court: *Baker* v. *Carr*, 369 U.S. 186 (1962); *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Perkins* v. *Matthews*, 400 U.S. 379 (1971); and *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971).

QUESTIONS PRESENTED

1. Whether the district court in this reapportionment case could refuse to hear appellants' fifteenth amendment claims, and at the same time insulate the State of Mississippi from the requirements of section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

2. Whether the fourteenth amendment allowed the district court to devise a reapportionment plan consisting largely of multi-county, multi-member districts (in a state where counties have been historically subdivided) which still contained the following variances:

(a) Variances of 19.729% in the House and 18.903% in the Senate;

(b) A majority of the districts in both houses varying by more than 5% from the norm; and

(c) Allocation of seats within certain districts which increased the variances to 62.693% in the House and 20.261% in the Senate.

3. Whether relief to which the district court held appellants were entitled could be delayed until the 1975 elections.

STATEMENT OF THE CASE

This case was filed by present appellants in 1965, and resulted in a judgment holding the apportionment of both houses of the Mississippi State Legislature unconstitutional. *Connor* v. *Johnson*, 256 F. Supp. 962 (S.D. Miss. 1966). The Legislature then enacted a new reapportionment, but this plan was also held unconstitutional by the district court. *Connor* v. *Johnson*, 265 F. Supp. 492 (S.D. Miss. 1967). The district court then drew its own plan and ordered it into effect for Mississippi's 1967 elections, but retained jurisdiction of the subject matter and the parties to consider any reapportionment adopted by the State Legislature after the 1970 census, 265 F. Supp. at 499.

On March 23, 1971, Governor Williams signed House Bill 515, and, pursuant to the terms of the bill, it was filed with the district court on the same day. The court ordered the parties to submit their views by April 8, 1971. Appellants filed objections to the bill on grounds of substantial variances from the population norm, the crazy-quilt pattern of floterial districts, racial gerrymandering in the joinders of certain counties, dilution of the voting strength of blacks in multi-member districts, and the failure of the State to seek approval pursuant to section 5 of the Voting Rights Act of 1965. The objections were supported by a lengthy brief. In addition, appellants presented plans with variations

substantially less than those in H.B. 515. No pre-trial hearing was scheduled by the court.

On May 14, 1971, the court announced that H.B. 515 was unconstitutional under the one man, one vote rule of *Reynolds* v. *Sims,* 377 U.S. 533 (1964), and because the Legislature had improperly increased the size of both houses; it requested that counsel for all parties submit plans based on the court's decision. Because of the imminence of the primary elections scheduled for August, the court set noon May 17 for submission of plans and noon May 18 for objections thereto. Counsel for appellees declined to submit plans.

On May 17, appellants filed plans attached to a Motion for Affirmative Relief with numerous exhibits. The plans were in two categories; (1) basic starting plans for apportioning the Legislature submitted in accordance with the court's preference for maintaining county lines, but without waiver of the position that population variances therein were not constitutionally permissible; and (2) plans with a breakdown of a majority of the election districts, which noted that there had been insufficient time to provide all single-member districts or to reduce the population variances substantially.

On May 18, 1971, the district court entered an opinion and judgment establishing the new districts, and on May 21, 1971, amended its judgment.

The district court plan created districts for the House of Representatives which vary from 9.823% under to 9.906% over the population norm, a span of 19.729 percentage points. The ratio of the largest to the smallest district is 1.219 to 1. Senate districts

show a variance of 9.219% under to 9.584% over the norm, a span of 18.903 percentage points. The ratio of the largest to the smallest district is 1.208 to 1.

Of the total 46 House districts, 23, electing 63 of the 122 representatives, vary from the norm by over 5%. Of the 33 Senate districts, 18, electing 26 of the 52 senators, vary by over 5%.

Despite the court's observation that it sought to avoid multi-county, multi-member districts, that was the predominant pattern in both houses. The district court modified the election districts by imposing upon certain multi-county districts residency requirements for some seats and by creating floater representatives for certain multi-member, multi-county districts, after allocating seats to individual counties within the districts. The modifications increased the maximum variances so that the House districts vary from 24.269% under to 38.694% over the norm, a span of 62.963%, and the Senate districts vary from 10.677% under to 9.584% over the norm, a span of 20.261%.

The court held that Hinds, Harrison, and Jackson counties should be subdistricted, and retained jurisdiction to do so.[2]

Although appellants consistently urged the district court to consider their fifteenth amendment rights at every stage of this proceeding (Objections to H.B. 515, Memorandum in Support of Objections, statements of counsel at May 14 hearing, Motion for Affirmative Relief filed May 17, Motion to Alter or

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[2] A separate aspect of the case was the effort by plaintiffs to require the immediate implementation of that part of the court's opinion and judgment of May 18, 1971, approving in general the concept of single-member districts for the Hinds County delegation. *See* 402 U.S. 690 (1971) and 403 U.S. 928 (1971).

Amend Judgment filed May 21), the district court considered the effect of its reapportionment plan on blacks irrelevant (*see* statements of Circuit Judge Coleman at the May 14 hearing, Opinion of May 18, and the Order of May 21 denying appellants' Motion to Alter or Amend Judgment). Appellants' objection to consideration of H.B. 515 by the district court prior to submission pursuant to section 5 of the Voting Rights Act was not ruled upon by the court. Appellants' contention at the May 14 hearing that the court's plan would require submission pursuant to section 5 was rejected by the district court, which held that its plan "involv[ed] no racial discrimination in the exercise of the franchise under the Fifteenth Amendment."

Apart from the three counties to be subdivided, the court did not retain jurisdiction, as it had in 1967, but held that "the reapportionment plan herein set out *as to all other counties is final* and subject to no further review by this Court." Appendix 16a (emphasis in original).

In entering this final judgment after six years, the court awarded appellants neither costs nor attorneys' fees.

This appeal followed. No cross-appeal has been filed.

THE QUESTIONS ARE SUBSTANTIAL

A. The Judgment Below Ignores Appellants' Rights Under the Fifteenth Amendment and the Voting Rights Act

This case was filed in 1965 by black plaintiffs. As a result of their complaints, found justifiable by this district court, the apportionment existing in 1965 and two subsequent attempts by the Mississippi Legislature to reapportion itself have been declared void by the dis-

trict court, the Legislature has been forced to redraw the Congressional districts, and the district court has been required to draw two reapportionment plans for the Mississippi Legislature. Throughout this protracted litigation, the appellants have stressed their fifteenth amendment rights, but have been met by the district court's statements that race would not be a factor in its decision.

To ignore race and the racial implications of any action which involves the election process in Mississippi is to ignore the long history of suppression of black people in Mississsippi and Mississippi's efforts to exclude blacks from the election process. *See United States* v. *Mississippi,* 380 U.S. 128 (1965). The exclusion was virtually total from 1890 through the passage of the Voting Rights Act. The first elections following the Act were in 1967, but although blacks were registered in large numbers they had won only the dubious right to participate in elections tainted by a host of discriminatory measures. *See Allen* v. *State Board of Elections,* 393 U.S. 544 (1969). Appellants simply sought the right in this case to try to make 1971 different.

Public school plans, jury selection plans, employment practices—all of those matters touching the private as well as the public life of the citizens of this country—have been carefully examined by federal courts to determine if discrimination against blacks is present. Redistricting plans are no different; indeed, they require closer scrutiny. A federal court may not ignore that obligation. *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960); *Sims* v. *Baggett,* 247 F. Supp. 96 (M.D. Ala. 1965). This is especially true where, as

here, the court followed the legislature's plan as closely as possible. Appendix 4a.[3]

Since the district court refused to consider the racial implications of its plan, and refused, in fact, to conduct a hearing on fifteenth or fourteenth amendment objections to the plan, the record is somewhat sparse when measured by ordinary standards.[4] What the record does disclose, however, is a prima facie case of the kind of "cavalier treatment of predominantly Negro counties" that led a district court to find a racial gerrymander in Alabama. *Sims* v. *Baggett, supra,* at 109.[5]

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[3] In its most recent voting case from Mississippi, this Court quoted findings that "gerrymandering and boundary changes had become prime weapons for discriminating against Negro voters." Perkins v. Matthews, 400 U.S. 379, 389 (1971):

> " 'For example, State legislatures and political party committees in Alabama and Mississippi have adopted laws or rules since the passage of the Act which have had the purpose or effect of diluting the votes of newly enfranchised Negro voters. These measures have taken the form of switching to at-large elections where Negro voting strength is concentrated in particular election districts, facilitating the consolidation of predominantly Negro and predominantly white counties, and redrawing the lines of districts to divide Negro voting strength.' Hearings on Voting Rights Act Extension before Subcommittee No. 5 of the House Judiciary Committee, 91st Cong., 1st Sess. 17 (1969) (remarks of Mr. Glickstein)." *Ibid.*

[4] The record does not contain evidence of voting patterns, racial history and political features of the State and of particular counties that would give meaning to many seemingly neutral numbers.

[5] For example, Marshall County, 62% black, is combined with predominantly-white counties for multi-member districts in both the House (54% white) and the Senate (53% white).

Compare the treatment of Claiborne County, 75% black, which is placed in a three-member House district (53% white) and a two-member Senate district (55% white).

Congress has prescribed the method by which the review of race issues in this case should have been conducted: by requiring the State of Mississippi, under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, to satisfy the Attorney General of the United States or the United States District Court for the District of Columbia that the plan was not racially discriminatory in purpose or effect. The new act was not so submitted; pursuant to its own terms, it was filed in court the day it was signed into law.

Appellants argued unsuccessfully below that the court should not consider the plan until the section 5 determination had been made. When the district court subsequently drew its own plan, appellants argued, again unsuccessfully, that the plan must now be submitted under section 5, before it could be *administered* by the State of Mississippi. *See* 42 U.S.C. § 1973c.

In its June 3, 1971, per curiam order on appellants' Motion for Stay, this Court said "a decree of the United States District Court is not within reach of section 5 of the Voting Rights Act." Even accepting that view, it is not clear that it covers the instant case, since here there was no consideration of the fifteenth amendment and therefore, at least as to the racial issues with which section 5 deals, there was, in a sense, no "decree" of the district court.

Beyond this, however, the effect of section 5 on federal court decrees is a critical issue of enormous importance in the administration of the Voting Rights Act. It deserves plenary consideration by this Court, because the statement as it stands puts into the hands of the very officials at whom section 5 was aimed the power to destroy Congress' great remedy.

In section 5, Congress took extraordinary steps to end the use of devices, familiar or novel, to abridge equal voting rights; the burden of dealing with changes in voting laws or procedures was lifted from the voters and placed upon the covered officials, who were required to prove that the change had no racially discriminatory purpose *or* effect, and to do so in the special administrative or judicial tribunal assigned by Congress to that task.[6] This Court has repeatedly affirmed the degree to which local district courts have been preempted from considering matters within the protection of section 5.

In so holding, this Court has explicitly recognized the need for section 5 protection against the large potential for discrimination that inheres in changes in the composition of the electorate. *Perkins* v. *Matthews,* 400 U.S. at 389. The undeniable need for section 5 protection in reapportionment does not diminish when the reapportionment plan is the result of a federal lawsuit, because such suits contain no protections that would compensate for the ousting of section 5 jurisdiction. First, even under the best circumstances, the burden of proof advantage is lost and the black voter is remitted to his frustrating remedies under the fifteenth amendment.

But not even this much is guaranteed, for the reapportionment decree may issue in a case where all the parties are white and where the only issues raised are equal population requirements under the fourteenth amendment. This is not a fanciful danger. There are presently *twenty-one* reapportionment decrees in Mis-

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[6] *See* 116 Cong. Rec. S2755 (daily ed. March 2, 1970); 116 Cong. Rec. S3100-02 (daily ed. March 5, 1970).

sisssippi counties which have resulted from suits by white plaintiffs in which questions of race were never raised.[7]

Courts in both Virginia and Louisiana have recognized the need to await section 5 determination before proceeding in suits involving the reapportionment of the State Legislature. *Howell* v. *Mahan,* C.A. 105-71-N (E.D. Va. Order of May 24, 1971); *Bussie* v. *Governor of the State of Louisiana,* C.A. 71-202 (E.D. La. Oral Op. of August 2, 1971). The action of those courts is a perfect example of the traditional doctrine of primary jurisdiction. *Compare Far East Conference* v. *United States,* 342 U.S. 570 (1952); *Best* v. *Humboldt Placer Mining Co.,* 371 U.S. 334 (1963).

Deferring to the primary jurisdiction of the special agency or court designated by Congress to consider these questions would have given the court here guidance in reviewing the racial implications of the Legislature's plan and in considering the racial implications of the plan it was called upon to draw. It would also have prevented the district court from adopting those

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[7] The extant decrees cover the Boards of Supervisors in the following counties: Bolivar, Clay, Coahoma, DeSoto, Hancock, Harrison, Hinds, Itawamba, Jackson, Lauderdale, Leake, Lincoln, Lowndes, Monroe, Oktibbeha, Pike, Rankin, Sunflower, Washington, Wayne and Winston.

[8] In virtually all of these cases, the plan adopted had been prepared by the defendant county officials, and in some of the cases, it appears that the plan had been prepared before the lawsuit was filed. Had these plans been promulgated when they were first prepared, they would indisputably have had to be submitted under section 5 (as many other counties have had to submit voluntary reapportionments). Surely the applicability of section 5 does not depend on the fortuitous timing of a lawsuit; if it does, officials will have absolute power to avoid section 5 by simply waiting until a lawsuit is filed.

features of the Legislature's plan which could not gain section 5 approval. *LeBlanc* v. *Rapides Parish Police Jury,* 315 F. Supp. 783 (W.D. La. 1969); *compare Howell* v. *Mahan, supra,* Order of May 24, 1971.

Pre-judgment review should ordinarily be sufficient, since court-drawn plans are the exception, not the rule. But where the court proceeds to draw its own plan, there is no bar to the requirement that its racial aspects be reviewed by the Attorney General or by the district court in the District of Columbia.[8] Only this view is consistent with the purpose and language of the far-reaching means chosen by Congress to guarantee equal voting rights.

The court's refusal to consider race issues made its attempts to equalize population variances futile. Seeking population equality among racially gerrymandered districts is, to use the court's words, handing a voter "a stone which is dressed up with figures to look like bread." Appendix 15a.

B. The District Court's Plan Violates the Fourteenth Amendment

In considering the population equality requirements of the fourteenth amendment, the district court relied solely upon *Reynolds* v. *Sims,* 377 U.S. 533 (1964). The court did not cite *Swann* v. *Adams,* 385 U.S. 440 (1967) or *Kilgarlin* v. *Hill,* 386 U.S. 120 (1967). Nor did it refer to *Kirkpatrick* v. *Preisler,* 394 U.S. 526 (1969) or *Wells* v. *Rockefeller,* 394 U.S. 542 (1969). Any one of these cases requires reversal of the judgment in this case.

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[8] *Compare* Smith v. Hoboken R.W. & S.C. Co., 328 U.S. 123 (1946); Lockerty v. Phillips, 319 U.S. 182 (1943).

Even without consideration of the variances within the floterial districts, the district court's plan is remarkably similar to those found wanting by this Court in *Swann* and *Kilgarlin*. The ratios of the largest to the smallest district (1.2 to 1 in each house) are identical to those disapproved in *Kilgarlin*. With the reconstruction of the floterial districts to reflect the true percentage variances, the district court's plan is defective even by pre-*Swann* standards. Appendix D.

Appellants suggest that the district court found variances from the norm of 10%, or a span of 20%, acceptable, and so formulated its plan.[9] As has been pointed out, the goal in reapportionment and redistricting cases is equal population, not some arbitrary standard. *See Kirkpatrick* v. *Preisler, supra.* Here the acceptance of a 10% variance produced a plan with the maximum variances from the norm just under 10%, a total variance of almost 20% in both houses, and a majority of the legislators being elected from districts varying more than 5% from the norm. As shown by Appendix E, the use of some of appellants' districts in their proposed plans would have substantially decreased the variances in a number of instances, but the district court apparently did not consider this important in view of the 10% guideline.

The district court also held it was "not necessary" to breach county lines, and that doing so would be objectionable, primarily because of the effect of splitting counties on those voters annexed to another county.

The district court's plan does not reflect its reasoning. Of the 82 counties in Mississippi, only eight are

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[9] *See* Appendix A, pp. 14a-15a. *Compare* 265 F. Supp. at 496-98. The district court may have been misled by its erroneous belief that its earlier plan had been affirmed by the Supreme Court.

treated as units in the Senate plan, and 17 in the House plan. It may be desirable to maintain county unity and the integrity of county boundary lines, but this is not achieved by massing together as many as five counties for the election of several legislators. Under the fourteenth amendment, a state is not required (absent discrimination) to subdivide single counties or political subdivisions, but this Court's decisions give no support for the idea that disparate counties may be lumped together in multi-member districts in both houses, especially when the plan is drawn by a federal district court. *Connor* v. *Johnson*, 402 U.S. at 692 (June 3, 1971) (on Motion for Stay).[10] This is particularly true in a state which has a history of breaking county unity by subdividing counties with more than one legislator.[11]

The court sought to deal with some of the multi-member districts, but produced only a crazy quilt. For example, the court said that it would impose residence requirements in districts where the dominant county had at least 133⅓% of the population norm, but then failed to do so in House Districts 3, 15, 17, 30, 39 and

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[10] *Compare* Lucas v. Forty-Fourth General Assembly of the State of Colorado, 377 U.S. 713, 731, n.21 (1964). It does not appear that this Court has affirmed such a combination in a case where the issue was raised, except for Burnette v. Davis, 382 U.S. 42 (1965), which involved the combination of Richmond, Virginia, and its closely related suburban county, Henrico. *See* Mann v. Davis, 245 F. Supp. 241 (E.D. Va. 1965).

[11] Mississippi has no constitutional prohibition on breaking county lines. From 1890 to 1963, there were subdistricts for election of legislators from Hinds, Adams, Lauderdale, Lowndes, Oktibbeha and Chickasaw Counties.

At least 15 municipalities in Mississippi cross county lines. County lines are likewise broken with regularity in the formation of school districts.

46.[12] Again, the court subdivided House District 35 (one seat each to Pike and Lincoln counties, and one seat a floater), but kept at-large elections in analogous House District 3.

The district court's reapportionment plan would be deemed fatally deviant and irrational if passed by a state legislature; *a fortiori* it was unacceptable from a federal court.

C. Appellants Are Entitled to Effective Relief

(1) New Elections

The district court held that single-member districts should be ordered in Hinds, Harrison, and Jackson counties, but delayed this relief until the next election after 1971. Terms in both houses of the Mississippi Legislature are four years. Those elected this November will remain in office until January 1, 1976, unless prior relief is granted. This Court has held that relief may not be delayed so long. *Swann* v. *Adams*, 383 U.S. 210 (1966). That judgment is consistent with the decisions of district courts in at least 14 states which have ordered the terms of officials elected from malapportioned districts shortened and new elections held to fill the posts.

The rule is particularly clear in the Fifth Circuit,[13] and requires that single-member districts be drawn,

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[12] It did, however, impose a residence requirement on House District 8, which it gave as an example of its rule, despite the fact that the district does not fit the rule.

[13] Taylor v. Monroe County Board of Supervisors, 421 F.2d 1038 (5th Cir. 1969) (new election ordered on remand, C.A. EC 6744-K (N.D. Miss. Feb. 4, 1970); Hall v. Issaquena County Board of Supervisors, No. 71-2312 (5th Cir. July 29, 1971), and Howard v. Adams County Board of Supervisors, No. 71-2361 (5th Cir. July

and new elections held, as soon as possible.[14] The rule described here would also require new elections in other districts in the event the district court's plan is invalidated. *See Swann* v. *Adams*, 263 F. Supp. 225 (S.D. Fla. 1967).

(2) Costs and Attorneys' Fees

Although appellants succeeded in invalidating the Legislature's reapportionment plan for both Houses three times in five years, costs and attorneys' fees were finally denied. The question presented by this action of the district court is important not simply because it is so wrong, but because costs and attorneys' fees are an essential key to the preservation of constitutional rights.

Under Rule 54(d), Fed. R. Civ. P., "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." While this provision leaves some discretion in the district court, the denial of costs to winning plaintiffs in a case of this sort seems unprecedented.

The court here found that "the Legislature of the State of Mississippi has not acted capriciously or arbitrarily or oppressively in its efforts to reapportion itself." Appendix 17a. There is no support in the

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29, 1971) (orders directing that terms be shortened from four years to six months, pending appeals by black plaintiffs from orders of courts in the Southern District of Mississippi which (1) found malapportionment, (2) rejected or refused to consider fifteenth amendment and Voting Rights Act allegations, and (3) delayed relief until the 1975 elections).

[14] Appellants' right to prompt creation of the single-member districts is, of course, not affected by the erroneous failure of the district court on remand to subdistrict Hinds County in time for the primary elections.

record for this finding. Moreover, the standard itself is clearly erroneous, and has not been followed in any reapportionment case that appellants have found, in Mississippi or elsewhere; it should not have been used here.[15]

Though attorneys' fees are traditionally more discretionary, the enactment of Title II and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a and 2000e, and this Court's decision in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), have brought a major shift in courts' attitudes toward this remedy, especially in civil-rights cases. *See Lee* v. *Southern Home-Sites Corp.*, —— F.2d —— (5th Cir. June 11, 1971); *Bradley* v. *School Board of the City of Richmond, Virginia*, —— F. Supp. —— (E.D. Va. May 26, 1971).

District courts in Mississippi have recognized the appropriateness of attorneys' fees in county reapportionment cases: *Martinolich* v. *Dean*, 256 F. Supp. 612 (S.D. Miss. 1966) (Hancock County: $5,000); *Sigalas* v. *Cumbest*, C.A. 3239 (S.D. Miss. 1970) (Jackson County: $5,000); *Scott* v. *Burkes*, C.A. 4782 (S.D. Miss. 1971) (Leake County: $500); *Dyer* v. *Love*, 307 F. Supp. 974 (N.D. Miss. 1969) (Washington County: $10,000); *Kitching* v. *Bobo*, C.A. DC-7082-K (N.D. Miss. 1971) (Bolivar County: $3,350); *Carpenter* v. *Toler*, C.A. GC-718-K (N.D. Miss. 1971) (Sunflower County: $5,000); *Williams* v. *Hughes*, C.A. DC 7076-S (N.D. Miss. 1971) Coahoma County: $2500).

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[15] The proper standard is reflected in those cases where courts have recognized the important role of reapportionment plaintiffs by protecting them from cost awards even when they were unsuccessful, in whole or in part. W.M.C.A., Inc. v. Simon, 208 F. Supp. 368 (S.D.N.Y. 1962). *Cf.* Toombs v. Fortson, 380 U.S. 929 (1965) (on Motion to Retax Costs).

These are not minor matters if private plaintiffs are to continue to bear the costly burden of these cases. This Court should therefore make it clear that costs may not be denied winning plaintiffs in reapportionment cases, and that attorneys' fees should be granted in the absence of extraordinary circumstances.

CONCLUSION

Reapportionment cases are often decided, of necessity, summarily. In this case, prompt adjudication is necessary to protect valuable voting rights, but there are critical issues in the case that require plenary consideration. Appellants therefore pray that this Court note probable jurisdiction, advance this case on the docket, and set it down for expedited briefing and argument.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 3830

PEGGY J. CONNOR, ET AL., *Plaintiffs,*

v.

PAUL B. JOHNSON, ET AL., *Defendants.*

Before COLEMAN, Circuit Judge, and Cox and RUSSELL, District Judges.

Opinion of the Court

On March 3, 1967, this Court found it inescapably necessary to enter a decree reapportioning the Senate and the House of Representatives of the State of Mississippi in accordance with the one man-one vote rule, Connor v. Johnson, 265 F. Supp. 492 (S.D., Miss., 1967). On March 27, 1967, the Supreme Court affirmed, 386 U.S. 483, 87 S.Ct. 1174, 18 L.Ed.2d 224.

The Legislature elected in compliance with that reapportionment (in the regular quadrennial elections of 1967) took no action on the subject until it obtained the benefit of the United States Census of 1970, the results of which were announced in December, 1970.

When the Legislature convened in its regular session of January, 1971, it commendably and expeditiously set

about the enactment of a reapportionment to be used in the quadrennial elections of 1971, now imminently upon us. The Legislature passed House Bill No. 515, Laws of Mississippi of 1971, approved by the Governor on March 23, 1971.

Upon appropriate petition, the Constitutionality of House Bill No. 515 is now before us pursuant to our retained jurisdiction, 265 F.Supp. at 499. The original plaintiffs, as well as the State, have filed written briefs. We have heard oral argument. The matter must now be decided. The deadline for formal qualification of candidates in the State Democratic primary is June 4, 1971. The first primary election is August 3, 1971.

The duty of the Legislature (and of this Court when compelled to act) in the distribution of legislative seats among the various electoral districts of the State has been clearly delineated by the Supreme Court. Population is the *starting* point for consideration and is the *controlling* criterion for judgment in legislative reapportionment controversies. The fundamental principle of representative government in this Country is that there must be equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within the State, Reynolds v. Sims, 1964, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed. 2d 506. It would, of course, be futile for this Court to attempt to ignore the commands of Supreme Court decisions. Indeed, to do so, were we to shrink from the duty imposed upon us, would be to invite the possibility of void elections in 1971, with consequent electoral chaos and unnecessary expense to the public.

Flotorial districts are permissible if they comply with the overriding objective of reapportionment, which is substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen, Reynolds v. Sims, *supra;* Davis v. Mann, 1964, 377 U.S. 678, 84 S.Ct. 1441,

12 L.Ed. 2d 609; Burns v. Richardson, 1966, 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed. 2d 376.

The size of the legislative body is a matter left solely to the discretion of the State. Neither the Legislature nor this Court is authorized to interfere with the size of the State Senate or of the State House of Representatives as ordained by the people in the State Constitution, Reynolds v. Sims, *supra,* 377 U.S. at 580.

In our former decision, 265 F.Supp. at 494, we held that the legislative reapportionment of December 1, 1966, was unconstitutional on its face, null, and void. This alluded *not to the size of the two houses,* as ordained by a vote of the people on the Constitutional Amendment of 1962, but applied only to the distribution of the prescribed number of legislative seats among the 2,178,141 inhabitants of Mississippi as enumerated in the Census of 1960. Section 254 of the Mississippi Constitution, as amended by a vote of the people in 1963, provides that the House shall be composed of 122 members. Section 255 of the Constitution, as so amended, provides that the number of Senators shall be 52.

A reading of House Bill No. 515, of the Laws of Mississippi of 1971, the statute presently under consideration reveals that the Legislature, believing it had the authority to do so because of our prior decision, sought to raise the membership of the Mississippi Senate from 52 to 55 and the membership of the Mississippi House of Representatives from 122 to 125. Under this plan, even with the added seats, we find the following as to Senatorial Districts:

1st District, over-represented by 10.97%.

17th District, under-represented by 11.60%.

22nd District, over-represented by 13.58%.

25th District, under-represented by 10.66%.

29th District, over-represented by 14.26%.

31st District, over-represented by 10.87%.

33rd District, overrepresented by 12.11%.

34th District, over-represented by 11.30%.

No rational basis for these variances is recited in either House Bill No. 515 or in available legislative history.

Similar variances appear in the reapportionment of the House of Representatives. We do not encumber this opinion with a list of those variances because the deficiencies as to the Senate alone require the invalidation of the plan.

The immediacy of legislative elections for the entire membership of both the House and the Senate leaves no rational course but to revise the distribution of seats in the Mississippi Senate and House of Representatives so as to comply with Constitutional standards. We intend to interfere as little as possible with what the Legislature has done.

We have considered many plans, including those suggested by the plaintiffs, in the hope of attaining, *as nearly as possible,* equality in population among the several districts, without regard to race, sex, economic status, or place of residence within the State. We have made a good-faith effort to achieve equality in the population of the various electorial districts for the selection of Senators and Representatives in the Legislature of the State of Mississippi. The plan hereinafter set forth, district by district, for the membership of both houses represents our

best effort to attain equality, fitting 52 Senators on the one hand and 122 Representatives on the other within the borders of the State, *using those legal boundaries for which we have dependable population figures* from the United States Census of 1970. As we stated in our former decision, 265 F.Supp. at 494, which the Supreme Court approved, we have cast to one side any purpose of discrimination or favoritism of any kind.

According to the Census of 1970 Mississippi had a population of 2,216,912. Divided by 52, this means that the *norm* (absolute equivalent) for each Senatorial seat would be 42,633 people. Divided by 122, the *norm* for each House seat would be 18,171 people. The required objective is to attain this norm as nearly as possible for each House and Senatorial seat.

Pursuant to this approach, it is hereby determined that the districts for the election of 52 Senators and 122 Representatives in the Mississippi Legislature, until Constitutionally changed by the Legislature, shall be, and they are, established as hereinafter set out.

It is to be noted that the Court has made every endeavour to avoid multiple member districts, composed of more than one county. There are, however, only eleven of the eighty-two counties with enough population to elect a Senator. There are only 44 counties, of eighty-two, with enough population to elect a Representative. It has thus been necessary to combine counties to achieve that degree of population equality required by the Constitution.

Except where noted, all elections are to be held district-wide, that is, the entire district shall participate in the nomination and election of its quota of members in both the House and the Senate.

In districts electing more than one member, all candidates shall qualify and be elected by *Posts*, appropriately numbered to correspond with the number of offices to be filled.

There shall be thirty-three (33) Senatorial Districts, as follows:

District Number	County or Counties	Number of Senators	Total Population of District	Percentage of Population Above or Below Norm (Per Seat)
1.	DeSoto, Lafayette, and Marshall	2	84,093	1.375 —
2.	Benton, Pontotoc, and Union	1	43,964	3.122 +
3.	Alcorn and Tippah	1	43,031	.934 +
4.	Itawamba, Monroe, Prentiss and Tishomingo	2	85,963	.819 +
5.	Lee	1	46,148	8.245 +
6.	Chickasaw, Clay, and Lowndes	2	85,345	.094 +
7.	Calhoun, Choctaw, Montgomery, and Webster	1	46,028	7.963 +
8.	Panola and Yalobusha	1	38,744	9.122 —
9.	Quitman, Tate, and Tunica	1	46,286	8.568 +
10.	Coahoma	1	40,447	5.127 —
11.	Bolivar and Sunflower	2	86,456	1.396 +
12.	Humphreys and Washington	2	85,182	.099 —
13.	Leflore	1	42,111	1.224 —
14.	Grenada and Tallahatchie	1	39,192	8.071 —

District Number	County or Counties	Number of Senators	Total Population of District	Percentage of Population Above or Below Norm (Per Seat)
15.	Holmes, Issaquena, Madison, Sharkey, and Yazoo	2	91,835	7.705 +
16.	Attala, Carroll, and Leake	1	46,052	8.020 +
17.	Neshoba and Winston	1	39,208	8.034 —
18.	Noxubee and Oktibbeha	1	43,040	.955 +
19.	Kemper and Lauderdale	2	77,320	9.319 —
20.	Newton and Scott	1	40,352	5.350 —
21.	Rankin	1	43,933	3.049 +
22.	Hinds	5	214,973	.849 +
23.	Warren	1	44,981	5.507 +
24.	Claiborne, Copiah, Lincoln, and Simpson	2	80,980	5.027 —
25.	Adams, Amite, Franklin, Jefferson, and Wilkinson	2	79,461	6.809 —
26.	Pike and Walthall	1	44,256	3.807 +
27.	Covington, Jefferson Davis, Jones, Lawrence, and Marion	3	117,303	8.285 —

[For the method of election in this District see Footnote 1].

District Number	County or Counties	Number of Senators	Total Population of District	Percentage of Population Above or Below Norm (Per Seat)
28.	Clarke, Jasper, and Smith	1	44,604	4.623 +
29.	George, Greene, Perry, and Wayne	1	46,719	9.584 +
30.	Forrest, Lamar, and Stone	2	81,159	4.816 —
31.	Hancock and Pearl River	1	45,189	5.995 +
32.	Harrison	3	134,582	5.226 +
33.	Jackson	2	87,975	3.178 +

FOOTNOTE No. 1

In the twenty-seventh District, Jones County shall nominate and elect the Senator to Post 1, the remaining counties shall nominate and elect the Senator to Post 2, and Post 3 shall be nominated and elected by the District at large. Posts 1 and 2 each have more than enough population to meet the norms, and the surplus complies with the norm a third time.

THE HOUSE OF REPRESENTATIVES

There shall be forty-six (46) Districts for the election of Members of the House of Representatives, as follows:

District Number	County or Counties	Number of Representatives	Total Population of District	Percentage of Population Above or Below Norm (Per Seat)
1.	Alcorn, Benton, and Tippah	3	50,536	7.297 —

[For the method of election in this District see Footnote 2].

District Number	County or Counties	Number of Representatives	Total Population of District	Percentage of Population Above or Below Norm (Per Seat)
2.	Prentiss and Tishomingo	2	35,073	3.489 —
3.	DeSoto and Marshall	3	59,912	9.906 +
4.	Itawamba, Lee, and Monroe	5	97,038	6.808 +
	[For the method of election in this District see Footnote 3].			
5.	Chickasaw	1	16,805	7.517 —
6.	Pontotoc	1	17,363	4.447 —
7.	Union	1	19,096	5.091 +
8.	Calhoun and Lafayette	2	38,804	6.775 +
9.	Panola and Yalobusha	2	38,744	6.609 +
10.	Tate	1	18,544	2.053 +
11.	Coahoma, Quitman, and Tunica	4	68,189	6.186 —
	[For the method of election in this District see Footnote 4].			
12.	Tallahatchie	1	19,338	6.422 +
13.	Sunflower	2	37,047	1.943 +
14.	Bolivar	3	49,409	9.361 —
15.	Issaquena and Washington	4	73,318	.875 +
16.	Holmes and Humphreys	2	37,721	3.797 +

District Number	County or Counties	Number of Representatives	Total Population of District	Percentage of Population Above or Below Norm (Per Seat)
17.	Carroll and Leflore	3	51,508	5.514 —
18.	Grenada and Montgomery	2	32,772	9.823 —
19.	Attala	1	19,570	7.699 +
20.	Winston	1	18,406	1.293 +
21.	Choctaw and Webster	1	18,487	1.739 +
22.	Clay	1	18,840	3.682 +
23.	Lowndes, Noxubee, and Oktibbeha	5	92,740	2.075 +
	[For the method of election in this District see Footnote 5].			
24.	Kemper and Lauderdale	4	77,320	6.378 +
	[For the method of election in this District see Footnote 6].			
25.	Clarke, Jasper, and Newton	3	50,026	8.233 —
	[For the method of election in this District see Footnote 7].			
26.	Leake and Neshoba	2	37,887	4.254 +
	[For the method of election in this District see Footnote 8].			
27.	Scott and Smith	2	34,930	3.885 —
28.	Madison and Rankin	4	73,670	1.359 +
	[For the method of election in this District see Footnote 9].			

District Number	County or Counties	Number of Representatives	Total Population of District	Percentage of Population Above or Below Norm (Per Seat)
29.	Sharkey and Yazoo	2	36,241	.275 —
30.	Claiborne and Warren	3	55,067	1.018 +
31.	Hinds	12	214,973	1.414 —
32.	Copiah and Jefferson	2	34,044	6.323 —
33.	Adams	2	37,293	2.620 +
34.	Amite, Franklin, and Wilkinson	2	32,873	9.543 —
35.	Lincoln and Pike	3	57,954	6.312 +
	[For the method of election in this District see Footnote 10].			
36.	Simpson	1	19,947	9.774 +
37.	Covington, Jefferson Davis, and Lawrence	2	38,075	4.771 +
38.	Marion and Walthall	2	35,371	2.669 —
39.	Forrest and Lamar	4	73,058	.517 +
40.	Jones	3	56,357	6.120 +
41.	Wayne	1	16,650	8.371 —
42.	Greene and Perry	1	17,610	3.087 —
43.	Pearl River and Stone	2	35,903	1.205 —
44.	Hancock	1	17,387	4.315 —
45.	Harrison	7	134,582	5.806 +
46.	George and Jackson	6	100,434	7.881 —

FOOTNOTE No. 2

DISTRICT 1.

Alcorn County has more than enough population to meet the norm for one seat. Benton and Tippah have more than enough population to meet the norm for one seat. The surplus is enough for a third norm. Therefore, Alcorn County shall elect one representative, Post 1; Benton and Tippah Counties shall elect one representative, Post 2; and Post 3 shall be elected from the District at large. Wherever the word "election" is used herein it refers also to primary nominations.

FOOTNOTE No. 3

DISTRICT 4.

Lee County has 26% more population than required for two seats, Monroe County lacks 7% having sufficient population for two seats, Itawamba County lacks 8% of enough population for one seat. Therefore in District 4, the County of Lee shall elect two representatives, Posts 1 and 2; the County of Monroe shall elect one representative, Post 3, the County of Itawamba shall elect one representative, Post 4, and one representative, Post 5, shall be elected from the District at large.

FOOTNOTE No. 4

DISTRICT 11.

In compliance with the norms as hereinabove explained, Coahoma County shall elect two representatives, Posts 1 and 2; the Counties of Quitman and Tunica shall elect one representative, Post 3, and one representative, Post 4, shall be elected by the District at large.

FOOTNOTE No. 5

DISTRICT 23.

In compliance with the norms as indicated in Footnotes 2 and 3, the County of Lowndes shall elect two representatives, Posts 1 and 2, the Counties of Noxubee and Oktibbeha shall elect two representatives, Posts 3 and 4, and one representative, Post 5, shall be elected from the District at large.

FOOTNOTE No. 6

Under the Constitution of 1890 (until 1964) Kemper County had two representatives. Under the reapportionment ordered by this Court in 1967, 265 F.Supp. at 497, Kemper County joined Neshoba County in the election of two representatives. Under the 1970 Census Kemper County has only 10,233 people, or 43% of the norm for a representative. If combined with Neshoba County for two representatives the District would be 14% below the norm; if combined with Neshoba for one representative the District would be 70% above the norm. To stay within the norms, the only alternative is to combine the County with Lauderdale, which has nearly seven times as much population. Kemper is on the Alabama line and there is no other place to put it. It is also combined with Lauderdale County for the election of Senators, for the same reasons. The effect of this is that while a vote in Kemper County would theoretically be equal to one in Lauderdale, the practicalities, on a seven to one basis, would be to disenfranchise the voters of Kemper County as to the election of either a representative or senator from that County. To meet this situation in a manner which we believe would meet with the approval of the Supreme Court, we direct that all candidates for representative residing in Kemper County shall qualify for Post Number 4 and that no candidate from Lauderdale County shall be allowed to qualify for that Post, but the election shall be from the District at large. Our solution is to have one representative a resident of Kemper County but chosen by the people of the District as a whole.

FOOTNOTE No. 7

DISTRICT 25.

In this District, Newton County shall elect one representative, Post 1; the Counties of Clarke and Jasper shall elect one representative, Post 2; and one representative shall be elected from the District at large, Post 3.

FOOTNOTE No. 8

DISTRICT 26.

In this District, Leake County has a population of 6.5% under the required norm, while Neshoba County has a population 14.5% in excess of the norm. The representatives shall be elected from the District at large, but those candidates residing in Neshoba County shall qualify for Post 1, and those residing in Leake County shall qualify for Post 2.

FOOTNOTE No. 9

DISTRICT 28.

In this District, Madison County shall elect one representative, Post 1; Rankin County shall elect two representatives, Posts 2 and 3, and one representative shall be elected from the District at large, Post 4.

FOOTNOTE No. 10

DISTRICT 35.

In this District, Pike County shall elect one representative, Post 1; Lincoln County shall elect one representative, Post 2; and the third representative shall be elected by the District at large, Post 3.

It will be noted from the foregoing that no district for the election of Senators varies from the norm by as much as 10% and 15 districts vary by less than 5%. As to the House of Representatives no district varies from the norm by as much as 10% and 21 vary by less than 5%.

In Mississippi each County is divided into five beats, which are the units of county government. Supervisors, school board members, local election commissioners, justices of the peace, and constables, (local county officials) are elected from the beats. The plaintiffs have suggested that a more nearly equal apportionment might be attained in some instances by separating a beat from the county to which it belongs and adding it to another county in order to attain a population figure more closely approaching the

norm and in order to create districts for the election of a single legislator. It is the opinion of the Court, however, that such action is not necessary in order to attain satisfactory reapportionment, as the hereinabove tables of population clearly demonstrate.

There are two added objections. First, the County has always been the only unit of state government. The boundaries have been fixed by statute for generations. Every citizen, regardless of his lack of education or other opportunities, knows the county of his residence and where he is expected to vote. There are 410 beats in Mississippi, the boundaries of which may be, and often are, changed by order of the Board of Supervisors. Beat lines generally follow governmental land lines as laid down by section, township, and range—in other words invisible to all, and unknown to most. It is a rare individual who knows where a beat line is at any given point, although most are able to keep up with the general location of the beat for the purpose of electing local officials with whom the voter is personally acquainted. Even worse, in our opinion, is the thought that a beat taken from one county and arbitrarily annexed to another for the sole purpose of attaining a desired, arbitrary population ration, would, in practical effect, destroy the weight of the vote of the annexed (minority) beat. The voter would *appear* to be voting on an equality, and mathematically this would be so, but his chance of influencing the outcome desired by the great majority living in the adjoining county would be ephemeral.

We, therefore, adhere to county lines as the best, fairest, and most effective method of delineating districts for the election of state legislators in Mississippi. When a voter asks for bread there is no point in handing him, instead, a stone which is dressed up with figures to look like bread.

We are of the further opinion, however, that some merit is to be found in the objections of the plaintiffs to the election of large numbers of representatives from the counties at large in metropolitan areas such as Hinds, Harrison, and Jackson Counties.

Hinds County is entitled to twelve representatives, Harrison County is entitled to seven, Jackson County is entitled to five (without George). The Mississippi Constitution of 1890 divided several Counties, *within the county,* for the election of representatives, generally along judicial district lines. In our opinion, a County which elects three representatives or less presents no problem because the candidates are required to run by Posts, which eliminates multitudes from entering the same contest, to the consequent confusion of issues and personalities. When, however, a county, within its own borders, elects four or more representatives it would be ideal if it could be divided into districts, for the election of one member to the district. Under the reapportionment plan herein adopted by this Court the following Counties elect four or more senators or representatives from within their own borders: Hinds, Harrison, and Jackson.

There is no evading the fact that with the time left available it is a matter of sheer impossibility to obtain dependable data, population figures, boundary locations, etc. so as fairly and correctly to divide these counties into districts for the election of single members of the Senate or the House in time for the elections of 1971. However, the legislatures to be chosen in 1975 and 1979 will be based on the Census of 1970. This Court now states, therefore, that as of January 1, 1972, it expects to appoint a special master to take testimony and make findings as to whether the counties of Hinds, Harrison, and Jackson may feasibly be divided into districts of substantially equal numbers in population for the elections of 1975 and 1979 and to file his recommendations with this Court for appropriate adjudication. As to this, jurisdiction is retained.

The reapportionment plan herein set out *as to all other Counties is final* and subject to no further review by this Court.

As provided by Rule 52, Federal Rules of Civil Procedure, this opinion shall constitute the findings of fact and

conclusions of law in this case. This opinion, signed by the Judges of this Court, shall also constitute and is hereby expressly declared to be the formal JUDGMENT of this Court in the premises and shall be recorded as such.

It being found that the Legislature of the State of Mississippi has not acted capriciously or arbitrarily or oppressively in its efforts to reapportion itself, the respective parties hereunto shall bear their own costs.

A copy of this opinion, duly certified, shall be served upon each Member of the Election Commission of the State of Mississippi and upon the Clerk of the Mississippi House of Representatives and the Secretary of the Mississippi State Senate and due return made of such service. The Clerk of the House and the Secretary of the Senate are respectfully requested to have this opinion and judgment printed as soon as possible for the use of the Membership of the respective branches of the Legislature.

This being the action of a Court of the United States, sitting in equity, and not State action, and this being for the purpose of complying with the one man-one vote requirements of the United States Constitution, involving no racial discrimination in the exercise of the franchise under the Fifteenth Amendment, we are of the opinion that it is not necessary that this reapportionment plan be submitted to the Attorney General of the United States or the Courts of the District of Columbia under the Voting Rights Act of 1965, as extended, 42 U.S.C. 1971, 1973, et seq.

This judgment shall be in full force and effect from and after this date.

So ORDERED, ADJUDGED, and DECREED, this May 18, 1971.

/s/ JAS. P. COLEMAN
United States Circuit Judge

/s/ WILLIAM HAROLD COX
United States District Judge

/s/ DAN M. RUSSELL, JR.
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION No. 3830

PEGGY J. CONNOR, ET AL., *Plaintiffs*,

v.

PAUL B. JOHNSON, ET AL., *Defendants*.

Before COLEMAN, Circuit Judge, and COX and RUSSELL, District Judges.

Order Amending and Supplementing Judgment Dated May 18, 1971

Heretofore, on May 18, 1971, this Court entered judgment in the above styled and numbered cause. This Order, now made and entered by the Court, sua sponte, amends and supplements that Judgment to the extent hereinafter indicated; otherwise, said Judgment of May 18, 1971 remains in all respects unchanged and in full force and effect.

The division of the State of Mississippi into 46 districts for the election of Representatives shall remain unchanged.

The identification of Posts in Districts 8, 9, 23, 29, 32 and 43 shall be and is hereby made more specific, to-wit:

District 8. Only residents of Lafayette County shall qualify as candidates for Post 1.

District 9. Only residents of Panola County shall qualify as candidates for Post 1.

District 23. Only residents of Oktibbeha County shall qualify as candidates for Post 3.

District 29. Only residents of Yazoo County shall qualify as candidates for Post 1.

District 32. Only residents of Copiah County shall qualify as candidates for Post 1.

District 43. Only residents of Pearl River County shall qualify as candidates for Post 1.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In District 8, Lafayette County has a population of 24,181, or 33⅓% more than the number of people required [by the norm of 18,171] for the election of one representative in its own right. To complete a district which would be as near as possible to the norm for the election of representatives Calhoun County with a population of 14,623 was joined with Lafayette for the election of two representatives, resulting in a district which came within 6.775% of the norm.

Similar steps were taken in the following districts:

District 9, Panola, population 26,826, joined with Yalobusha, 11,195.

District 23. In Posts 3 and 4, Oktibbeha, population 28,752 was joined with Noxubee, population 14,288.

District 29. Yazoo, population 27,304, joined with Sharkey, population 8,937.

District 32, Copiah, population 24,749, joined with Jefferson, 9,295.

District 43. Pearl River County, population 27,802, joined with Stone, population 8,101.

Therefore, the first named county in each of the foregoing districts has at least 33⅓% more than enough population to elect a representative in its own right in compliance with the state norm. Other counties [i.e., Districts 5, 6, 7, 10, 12, 19, 20, 22, 36, 41 and 44] with populations of approximately 18,000 are permitted a representative because they have the required number of people and happen to be so fortunately situated geographically that no combination with any other county was required.

It is, therefore, appropriate that counties with populations at least 33⅓% in excess of the norm should be en-

titled to a representative residing within their borders, although the election is to be from the District at large, so that all the people in the District participate in the choice.

This amendment and supplement to the Judgment of May 18, 1971 will result in a more equitable application of the one man-one vote rule and renders less likely the loss of representation by those clearly entitled to it. Moreover, by this arrangement the counties with the smaller population will participate in the election of two representatives, whereas, under the norm they could, standing alone, have elected no representative at all.

It is further ordered that if any candidate in Districts 8, 9, 23, 29, 32 and 43 has qualified as a candidate since May 18, 1971 not in conformity with this Judgment, then the appropriate authority shall conform the qualification to this Judgment so as to allow the candidacy to proceed.

So Ordered, Adjudged, and Decreed, as an amendatory and supplemental Judgment, this May 21, 1971.

/s/ Jas. P. Coleman
United States Circuit Judge

/s/ Harold Cox
United States District Judge

/s/ Dan M. Russell, Jr.
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION No. 3830

PEGGY J. CONNOR, ET AL., *Plaintiffs,*

v.

PAUL B. JOHNSON, ET AL., *Defendants.*

Order Overruling Motion of Plaintiffs for Appointment of Special Master To Create Single Member District in Hinds County

It is the firm view of this court as announced at the outset of the trial in this case that race shall have nothing whatsoever to do with a reapportionment plan for the election of members of the Mississippi Legislature under the one man-one vote rule. Hinds County was last redistricted by this court in Civil Action No. 4483 by order dated December 19, 1969 with an accompanying plan under separate cover. There was a vast change made in the location and boundaries of the five districts of Hinds County between the 1960 and 1970 census. The 1970 census does not reflect sufficient information as to any identifiable segment of voters in said five districts to enable the court to make any dependable disposition of such problem at this time. More information and more study by the court will be necessary before the court can properly decide upon the question presented. It is the view of the entire court that such motion at this time is without merit and should be overruled. Said motion is accordingly denied.

The undersigned as managing judge in this case, with permission of the entire court, accordingly signs and enters this order for the court.

ORDERED, this May 21, 1971.

/s/ HAROLD COX
United States District Judge

APPENDIX D

The district court's opinion established eight districts containing floaters, with a total of 24 constituent counties, as shown below. The deviations shown below are based on a method analogous to that used in *Kilgarlin* v. *Martin*, 252 F. Supp. 404 (S.D. Tex. 1966), rev'd on other grounds, 386 U.S. 120 (1967):

County	Population	Deviation
SENATE DISTRICT 27 (Court's deviation: 8.285%—)		
Covington	14,002	
Jefferson Davis	12,936	5.951%—
Lawrence	11,137	
Marion	22,871	
Jones	56,357	10.677%—
HOUSE DISTRICT 1 (Court's deviation: 7.297%—)		
Alcorn	27,179	2.735%—
Benton	7,505	12.091%—
Tippah	15,852	
HOUSE DISTRICT 4 (Court's deviation: 6.808%+)		
Itawamba	16,847	21.005%—
Lee	46,148	2.587%+
Monroe	34,043	38.694%+
HOUSE DISTRICT 11 (Court's deviation: 6.186%—)		
Coahoma	40,447	14.160%—
Quitman	15,888	19.195%+
Tunica	11,854	
HOUSE DISTRICT 23 (Court's deviation: 2.075%+)		
Lowndes	49,700	7.859%+
Noxubee	14,288	3.874%—
Oktibbeha	28,752	

County	Population	Deviation
House District 25 (Court's deviation: 8.233%—)		
Newton	18,983	24.269%—
Jasper	15,994	5.421%+
Clarke	15,049	
House District 28 (Court's deviation: 1.359%+)		
Madison	29,737	16.587%+
Rankin	43,933	6.879%—
House District 35 (Court's deviation: 6.312%+)		
Lincoln	26,198	0.710%—
Pike	31,756	12.923%+

APPENDIX E

The following groupings (containing 39 counties, 48 House seats) are severable from both Plaintiffs' Basic Plan (Record 35, Exhibit 8) and the District Court Plan for the House of Representatives:

Group I

Plaintiffs' Plan	No. of Seats	Variance Per Seat	Court Plan	No. of Seats	Variance Per Seat
DeSoto	2	1.255%−	DeSoto		
Marshall			Marshall	3	9.906%+
Benton			Benton		
Tippah			Tippah		
Alcorn	4	2.587%+	Alcorn	3	7.297%−
Average variance per seat		2.310%	Average variance per seat		8.602%
Span		3.842	Span		17.203

Group II

Chickasaw			Chickasaw	1	7.517−
Calhoun			Panola		
Lee	4	6.731−	Yalobusha	2	6.609+
Tunica			Calhoun		
Quitman			Lafayette	2	6.775+
Panola	3	0.110+	Bolivar	3	9.361−
LaFayette			Coahoma		
Yalobusha	2	0.677−	Quitman		
Itawamba	1	7.286−	Tunica	4	6.186−
Monroe	2	6.323−	Itawamba		
Bolivar			Lee		
Coahoma	5	1.101−	Monroe	5	6.808+
Average variance per seat		3.179%	Average variance per seat		7.127%
Span		14.017	Span		16.169

Group III

Plaintiffs' Plan	No. of Seats	Variance Per Seat	Court Plan	No. of Seats	Variance Per Seat
Copiah			Copiah		
Lawrence	2	1.255—	Jefferson	2	6.323—
Jefferson Davis			Simpson	1	9.774+
Marion	2	1.469—	Marion		
Simpson			Walthall	2	2.669—
Covington	2	6.582—	Covington		
Jefferson			Jefferson Davis		
Lincoln	2	2.333—	Lawrence	2	4.771+
Amite			Amite		
Pike			Franklin		
Walthall	3	6.433+	Wilkinson	2	9.543—
Franklin			Lincoln		
Wilkinson	1	5.168+	Pike	3	6.312+
Average variance per seat		3.979%	Average variance per seat		6.277%
Span		11.750	Span		19.317

Group IV

Wayne			Wayne	1	8.371—
Jones	4	.004—	Jones	3	6.120+
Average variance per seat		0.004%	Average variance per seat		6.683%
Span		0.0	Span		14.491

Group V

Leake	1	5.955—	Leake		
Neshoba			Neshoba	2	4.254+
Newton			Clarke		
Jasper	3	2.322+	Jasper		
Clarke			Newton	3	8.233—
Kemper			Kemper		
Lauderdale	5	1.557+	Lauderdale	4	6.378+
Average variance per seat		2.301%	Average variance per seat		6.052%
Span		8.277	Span		14.611

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-221

PEGGY J. CONNOR, ET AL.,
Plaintiff-Appellants,

vs.

JOHN BELL WILLIAMS, GOVERNOR OF MISSISSIPPI, ET AL.,
Defendant-Appellees.

APPEAL FROM THE SOUTHERN DISTRICT OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT OF MOTION TO DISMISS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-221

PEGGY J. CONNOR, ET AL.,
Plaintiff-Appellants,

vs.

JOHN BELL WILLIAMS, GOVERNOR OF MISSISSIPPI, ET AL.,
Defendant-Appellees.

APPEAL FROM THE SOUTHERN DISTRICT OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

Appellees move the Court, under Supreme Court Rule 16, to dismiss the appeal in that it does not present a substantial federal question as to the claims that (1) a reapportionment decree of a United States District Court should be submitted to the Attorney General of the United States or the United States District Court for the District of Columbia under 42 U.S.C. § 1973c or (2) that variations from the norms substantially under 10% where required for insuring a voice to political subdivisions are violative of the Fourteenth Amendment or (3) that multi-member constituencies drawn to achieve minimum population variances are violative of the Fourteenth Amendment.

Alternatively, appellees move the court to affirm the final judgment of the District Court on the ground that it is manifest that the questions on which the decision of the cause depends are so insubstantial as not to need

further argument: (1) Because the claim for review under the Voting Rights Act of a District Court decree is obviously without merit and because its unsoundness is unmistakably clear from the previous decisions of this court. (2) Because the claim that less than 10% variances when in pursuance of rational state policies violates the Fourteenth Amendment is obviously without merit and because its unsoundness is unmistakably clear from the previous decisions of the court. (3) Because the claim that multimember constituencies constitute a racial gerrymander operating invidiously to deprive a recognizable segment of the population of representation is obviously without merit and because its unsoundness is unmistakably clear from the previous decisions of the court.

It is, therefore, respectfully moved that this appeal be dismissed and, in the alternative, that the judgment of the District Court apportioning legislative districts of the State of Mississippi be affirmed.

Respectfully moved this 12th day of November, 1971.

JOHN BELL WILLIAMS, ET AL.
Defendants

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BRIEF IN SUPPORT OF MOTION TO DISMISS

FACTS

While the appellants' statement of the procedural history (i.e. 1966-1971) of the efforts to achieve a constitutionally apportioned legislature are accurate enough, appellees feel compelled to set out another version of events after the March 23, 1971, enactment of H.B. 515. The filing of that Bill with the District Court under its retained jurisdiction (265 F.Supp. 492) revived this litigation. After considering briefs and objections of the parties the court concluded on May 14, 1971, that H.B. 515 was unconstitutional. This determination was prompted by variances in the senatorial plan of 11.60% underrepresentation to 14.26% overrepresentation for some 8 districts.

On May 18, 1971, after considering plans and objections, the court entered an opinion and judgment establishing new districts. Because the jurisdictional statement of the appellants stresses only features of the adopted plan assertedly inimicable to their interest, we will briefly set out the district court's stated rationale for their plan. Based on the reported population figures from the 1970 census, the court found that the norm for a senatorial seat was 42,633 persons and 18,171 persons for a house seat. 82 counties, varying from 2,731 persons to 214,973 persons comprise the state. The court specifically found that only 11 of these 82 counties had sufficient population to elect a senator and only 44 of the 82 could elect a representative.

With this background, the court set about its task of redistricting with the expressed objective of achieving

"*as nearly as possible*, equality in population among the several districts without regard to race, sex, economic status, or place of residence within the state." *Connor* v. *Johnson*, 330 F.Supp. 506 (S.D. Miss. 1971). Within the widely disparate parameters of the county populations, multi-member districts were unavoidable.

The court did not depart from county subdivision lines for several cogent reasons: (1) No dependable population figures were available from smaller entities. (2) County subdivisions fixed by statute for generation were, the court felt, within the knowledge of every citizen, whereas other smaller divisions fluctuated often and were unknown to most inhabitants. (3) Votes of persons in subdivisions truncated from their counties would be practically destroyed.

Thus confined to county subdivisions and restricted to equality of population as the measure, the court found that multi-member districts were inevitable. By realigning districts, the court was able to reduce the variances to under 10% both over and under the norms. Even the 10% disparity is deceptive. Of the 33 senatorial districts, only 3 vary from the norm either way by as much as 9%. Only 4 of the 46 house districts vary by 9%. 21 of the senatorial districts and 26 of the house districts vary less than 6% either way.

Since the multi-member districts as drawn, come under heavy attack, we separately consider them. Three senatorial districts are as large as five counties. Relevant to the claim of racial gerrymandering is the fact that two of the three have *black majorities*. (See maps, appendix 1). The third district (37th District) is substantially white and borders on no county having black majorities. Eight house districts are as large as three counties but given 82 counties and 122 seats, such a result

is not extraordinary. Finally, within these multi-seat constituencies separate seats are distributed to the counties according to population. (Id. at 517-521).

A subsidiary problem of the court authored plan was the distribution of seats in the three largest counties entitled to twelve, seven, and five representatives respectively. Lacking data and time on which to predicate a judgment in this matter, the court retained jurisdiction and stated its intention to appoint a master as of January 1, 1972, to make findings on the feasibility of single member districts for these most populous counties. An interlocutory appeal to this court for a stay of the District Court's Order as it related to these populous counties resulted in a remand for expedited consideration of single member districts. *Connor* v. *Johnson*, 402 U.S. ....., 91 S.Ct. ....., 29 L.Ed.2d 268 (1971). On remand it was found impossible to carve out single member districts in the time required. *Connor* v. *Johnson*, 330 F.Supp. 521 (S.D. Miss. 1971). On June 21, 1971, the application for further stay to enforce this court's mandate was denied. *Connor* v. *Johnson*, 29 L.Ed.2d 722 (1971).

ARGUMENT

I.

Approval of a Federal Court's Reapportionment Decree under the Voting Rights Act Is Not Required.

In the application to this Court for stay of the District Court's May 18, 1971, order as it related to counties electing four or more senators, the court squarely rejected any contention that court decrees are within the coverage of the Voting Rights Act: "A decree of the United States Dis-

trict Court is not within the reach of §5 of the Voting Rights Act." *Connor* v. *Johnson*, 29 L.Ed.2d 270. That determination governs here as the law of the case. *Russell & Co.* v. *People of Puerto Rico*, 118 F.2d 225, cert. granted 314 U.S. 589, 62 S.Ct. 61, 86 L.Ed. 475 (1941), aff. 315 U.S. 610, 86 L.Ed. 1062, reh. den. 316 U.S. 708, 62 S.Ct. 1030, 86 L.Ed. 1775; Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818, 822 (1952).

II.

The District Court's Plan Conforms with the Population Equality Requirements of the Fourteenth Amendment.

Both the rationale and the numerical results of the District Court's plan conform to the guidelines set out in *Reynolds* v. *Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and its progeny. The District Court's opinion premised the plan upon equal representation for equal numbers of people. Population was slated to be both "the starting point for consideration and . . . the controlling criterion for judgment . . ." *Connor* v. *Johnson*, 330 F.Supp. 507. Where mathematical exactness was not achieved, the failure to do so rests on factors sanctioned by this Court in its review of reapportionment plans. *Swann* v. *Adams*, 385 U.S. 440, 87 S.Ct. 569, 14 L.Ed.2d 501 (1967).

We are aware, as we believe the District Court was, of this Court's reluctance to sanction uncategorically any given percentage variance because such a sanction would compromise the goal of mathematical equality by creating "target" percentages. *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969), reh. den. 395 U.S. 917, 89 S.Ct. 1737, 23 L.Ed.2d 231. Here the court started

with population equality as the standard and labored to harmonize with that standard those elements that make it so difficult of achievement: (1) The happenstance population variances among adjacent counties; (2) The limited possibility of combinations because of large counties which command seats of their own; (3) Necessity for reasonably compact districts and (4) Preservation of the county as a unit of representation.

The District Court's plan was not, in view of the geographic and demographic factors at war with absolutely equal districts, merely a compromise on 10% variance. The 10% outside variance which the District Court appeared to bless in *Connor* v. *Johnson*, 330 F.Supp. 518, does not, as the appellants argue, suggest a defect in methodology. The 10% variance was a result of a good faith effort to achieve parity, not a pre-determined benchmark of the plan.

If the starting point of the District Court's opinion was correct, what of the result? As *Reynolds* and progeny instruct, this is a two part inquiry: (1) The degree of deviation, i.e. how much and (2) The character, i.e. do permissible factors support it. *Reynolds*, supra at 539.

We contrast the result of the District Court's plan with two others found defective:

	District Court Plan	Swann v. Adams	Kilgartin v. Hill
HOUSE OF REPS.	9.823% plus 9.906% minus	18.28 plus 15.27 minus	14.84 plus 11.64 minus
SENATE	9.219% minus 9.584% plus	10.56 minus 15.09 plus	——— ———
RATIO	1.208 to 1 (largest to smallest)	1.41 to 1	1.31 to 1

Several things are at once clear. With the knowledge that the outside variations quoted for the District Court plan are only the most extreme variations, we submit that the District Court's plan, with proper justification, is acceptable and perhaps even acceptable on its face. Although prior to *Kirkpatrick* it could have been argued that smaller variations than those found in *Swann* and *Kilgartin* might be justified by a lesser showing of justification, *Kirkpatrick* seems to require than any departure from virtual equality would require a full showing of acceptable state policy.

The primary consideration justifying departure from exact population equality is that of maintaining the traditional political subdivisions. This is entirely in accord with *Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506, 538 (1964). Appellants desire to convert this well respected consideration into a requirement that county units must be joined together in the traditional way and, by the same token, must not be joined into larger than usual units. We suggest that joinder of counties with new companions or into larger units to achieve greater parity of representation does not weaken the case for insuring a voice for political subdivisions. Moreover, the Court has, in the footnotes to the plan, complied with *Kilgartin's* mandate by showing ways in which respect for county lines justified particular deviations and related these to particular deviations. Id. at 517-521.

III.

The District Court Properly Declined to Hear Evidence on the Racial Aspects of the Plan.

In constructing a constitutional plan of reapportionment, the District Court determined that race should not be a consideration and heard no proof on that issue. Several important considerations support that choice. First, the

plan was that of a court of the United States, the actions of which are untainted by any history of discrimination in Mississippi. *United States* v. *Mississippi*, 380 U.S. 128, 85 S.Ct. 808, 13 L.Ed.2d 717 (1965); *Allen* v. *State Board of Elections*, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969). Similarly, a federal court's plan is not impeached by the actions of state legislatures in allegedly diluting the black vote subsequent to the Voting Rights Act. *Perkins* v. *Matthews*, 400 U.S. 379, 389, ___ S.Ct. ___, ___ L.Ed.2d ___ (1971).

This is not to say the actions of federal courts touching voting rights are presumptively correct. All it signifies is that federal courts' actions are not inherently suspect and should be appraised on their face. Second, introducing racial considerations places the court between Scylla and Charybdis. It cannot purposefully exclude blacks from districts, *Gomillion* v. *Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), or intentionally include them within districts, *Wright* v. *Rockefeller*, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964). By adhering strictly to population, the federal court avoided unconstitutional consciousness of race. To a great extent, the results vindicate the approach. Blacks have majorities in two of the three largest senatorial districts. No pattern of capricious joinder of black counties with white counties is evident from the districts and the accompanying population statistics which the court may judicially notice. (Appendices 1 and 2).

We acknowledge that the court has foreshadowed circumstances where multi-member districts can operate to cancel out the voting strength of racial elements of the population. *Burns* v. *Richardson*, 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376, 389 (1966). Foreclosing an offer of proof here is not overly harsh against the probabilities of what it might turn up. All except one of the factors set out in *Burns* to facilitate proof of a racial gerrymander are absent. No

district in Mississippi elects a substantial proportion of the seats in either house and all but a few districts have provisions for at-large candidates running from subdistricts. The only tendency conducive to dilution is that both houses of the Mississippi Legislature have multi-member districts. *Whitcomb* v. *Chavis*, 403 U.S. ....., 91 S.Ct. ....., 29 L.Ed.2d 363 (1971). Black majorities in two of the three largest senatorial districts would appear to mitigate this feature of the plan. Moreover, presence of multi-member districts in both houses, given the number of seats and the configuration of the counties, is not easily avoidable.

While the opportunity for demonstrating the invidious effect of multi-member constituencies is theoretically open, it is our position that subsequent decisions of this court, particularly *Whitcomb* v. *Chavis*, have narrowed this avenue to a needle's eye. In short, if the racial composition of the districts taken from census figures do not import discrimination (as by uniting blacks' counties into combinations with preponderantly white counties) proof to the contrary is a frivolous exercise. Certainly, proof that a federal court ordered plan operated designedly to dilute voting strength, *Fortson* v. *Dorsey*, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965) is fanciful.

As to any discriminatory effect of multi-member constituencies, this court in *Whitcomb* v. *Chavis* dealt with and dismissed a wide sweep of such claims. Plural representation with its attendant bloc voting, proportional underrepresentation of residents of identifiable areas, or simply a chronic pattern of losing elections, were all found not to be invidious discrimination. *Whitcomb* v. *Chavis*, 378-381. Equal access to the political system for all groups was, of course, a cornerstone of these findings. This would appear to be true no matter how recently such access has been gained. Such a holding is necessary to square *Chavis* with

earlier cases affirming multi-member districts in the south. *Mann* v. *Davis*, 247 F.Supp. 244 (D.C. Va. 1965) aff. sub nomine, *Burnette* v. *Davis*, 382 U.S. 42, 86 S.Ct. 181, 15 L.Ed. 2d 35 (1965). There multi-member districts for urban Richmond and suburban Henrico Counties were affirmed where dilution of the black vote from 42% to 29% was claimed. *Accord Dusch* v. *Davis*, 387 U.S. 112, 87 S.Ct. 1554, 18 L.Ed.2d 656 (1967); *Goldblatt* v. *City of Dallas*, 414 F.2d 774 (5 Cir. 1969).

IV.

Request for Interim Elections to Implement Single Member Districts Is Premature Pending Final Determination of the District Court; Alternatively, New Elections to Replace Multi-Member Delegations Are Unjustified by the Decisions of This Court.

A decision by this Court of the claim for interim elections in Hinds, Harrison and Jackson Counties would be premature and would invade the yet to be exercised discretion of the District Court. The District Court's opinion in *Conner* v. *Johnson*, 330 F.Supp. 506, 509 (S.D. Miss. 1971), is not a final judgment as to the creation of single member districts. Specifically reserved in that opinion is the right to appoint a special master as of January 1, 1972 to deal with this matter. The interlocutory appeal to this court, *Connor* v. *Johnson*, 402 U.S. ....., 91 S.Ct. ....., 29 L.Ed.2d 268, settled only that single member districts would be "ideal" if found feasible in the limited time before the June 18 deadline for qualification. The resulting remand culminated in the report of a master and a June 16, 1971, Order of the District Court finding it "literally impossible" in the allowable time to create single member districts. *Connor* v. *Johnson*, 330 F.Supp. 521 (S.D. Miss. 1971).

The net result of the failure to subdistrict Hinds County is that the original judgment of the District Court stands. Under its terms, the feasibility and the dimensions of single member districts are open for investigation beginning January 1, 1972. When the master again reports after January 1, 1972, remedial considerations will be open to the District Court and a final judgment will be entered. How deeply into the 1972-1976 legislative term this will come, no one can safely predict. Presently, when there is no finality to the District Court's Judgment, it is inappropriate for this court to act. *Catlin* v. *United States*, 324 U.S. 229, 65 S.Ct. 631, 89 L.Ed. 911 (1945).

Aside from the prematurity of a remedial ruling now, there are strong merit considerations that cut against a prospective ruling on the point. We are not dealing with intrinsically mal-apportioned units such as supervisors' districts, *Taylor* v. *Monroe County Board of Supervisors*, 421 F.2d 1038 (5 Cir. 1969), but with an "ideal" alternative (single member districts) to a constitutionally accepted method of apportionment. (Multi-member districts), *Whitcomb* v. *Chavis*, 403 U.S. ....., 91 S.Ct. ....., 29 L.Ed.2d 363 (1971). According to accepted principles all the representatives in these multi-member districts represent all of the voters. Allowing these representatives to conclude their term does not perpetuate an unconstitutional system.

Decisions of this Court ordering new elections display an intention to limit the remedy to situations where there is minimum disruption or where fundamentally defective elections take place. Thus, new elections were ordered in *Swann* v. *Adams*, 383 U.S. 210, 86 S.Ct. 767, 15 L.Ed.2d 707 (1966), where installation of a new plan was postponed beyond a regularly scheduled election sufficiently distant to permit easy implementation. Sim-

ilarly, the court has freely ordered new elections to replace those marked by fundamental violations. *Hodnet* v. *Amos*, 394 U.S. 358, 89 S.Ct. 1101, 22 L.Ed.2d 336 (1969). These cases grant no leave to order a new election where constitutional means of apportionment linger on for want of time to install a more "ideal" substitute.

V.

There Are No Compelling Circumstances Justifying an Award of Attorney's Fees; No Abuse of Discretion in Proration of Costs.

Attorney's fees are a matter of equitable discretion being granted where defendant's actions are "unreasonable and obdurately obstinate. *Williams* v. *Kimbrough*, 415 F.2d 874 (5 Cir. 1969). Without compelling circumstances, the court need not exercise its discretion to award attorney's fees. Cases where there is statutory authority have no bearing on this issue. *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970), does not indicate a general relaxation of the rule against awards of attorneys' fees. It merely authorized fees in a shareholder's derivative suit in order to spread the costs over all the shareholders, suing and nonsuing alike, through an award against the corporation.

Under Rule 54(d) Fed. R. Civ. P. : "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Here the court ordered the parties to bear their own costs. *Connor* v. *Johnson*, 330 F.Supp. 506 (S.D. Miss. 1971). Reversal of that determination is for an abuse of discretion. (6 Moore's Fed. Prac. 54.70 [5]). It is clear that the court may, where the action was brought in good faith on issues as to which the law is in doubt, require each party to bear their own costs. *Chicago Sugar Co.* v. *American Sugar Co.*, 176 F.2d 1, 11 (7 Cir. 1949). The rule should operate where the action

was defended in good faith and where the actions of the defendants were not oppressive or capricious. The primary case cited by appellants as authority for protecting reapportionment plaintiffs from cost awards does not so hold. *W.M.C.A., Inc.* v. *Simon*, 208 F.Supp. 368, 380 (S.D. N.Y. 1962) holds that no costs should be allowed to or against any party since reapportionment is a matter of public interest.

CONCLUSION

The District Court's plan conforms to the constitutional guidelines of *Reynolds* v. *Sims, et al.* The claims of racial gerrymandering are refuted by the statistics themselves. There is no merit whatever to the claim for approval of the court's plan under the Voting Rights Act.

Appellees submit that the appeal from the Judgment of the District Court establishing legislative reapportionment should be dismissed or, in the alternative, that the judgment and opinion upon which it is based should be affirmed without further briefing or argument.

Respectfully submitted,

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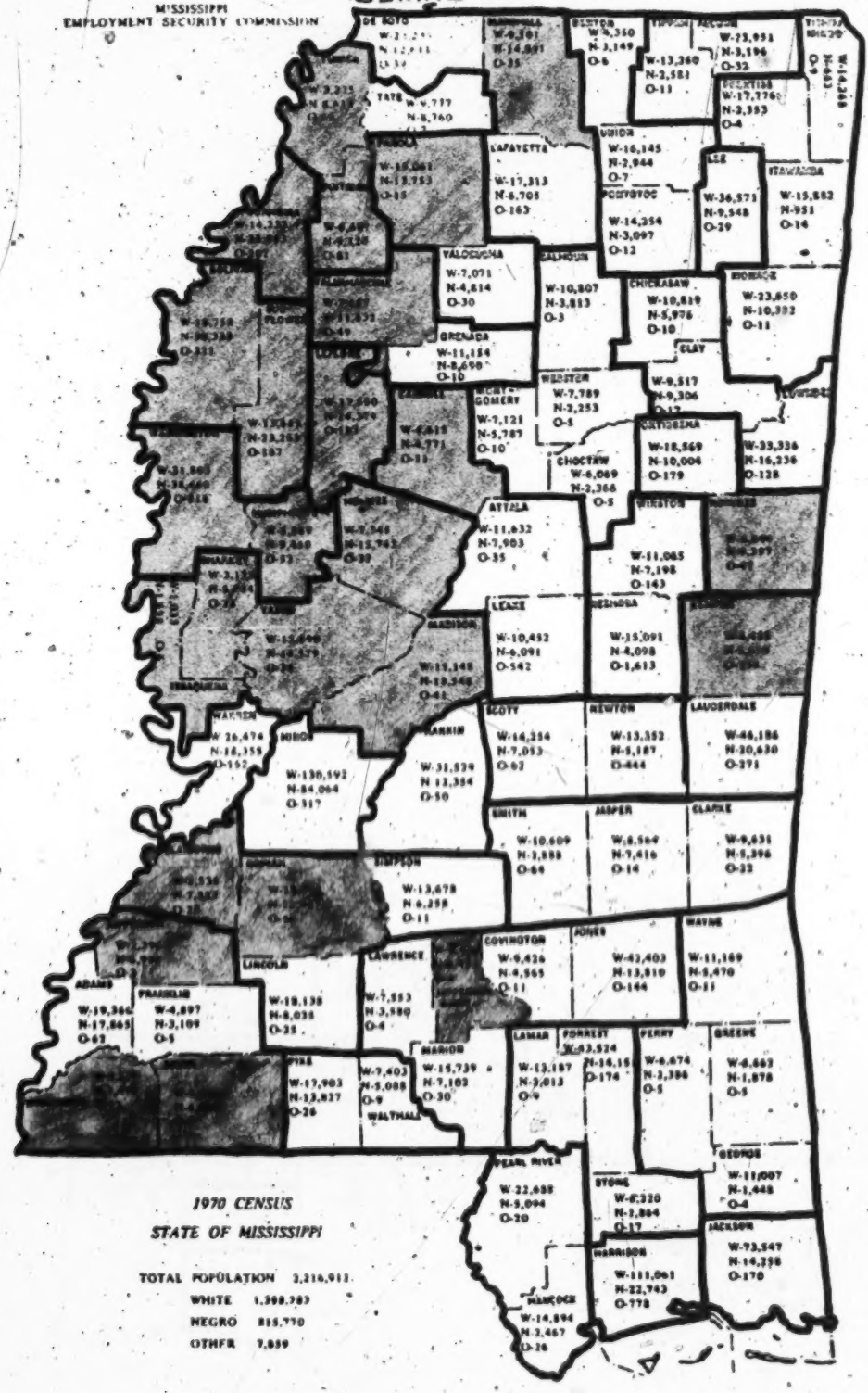
Special Assistant Attorney General of the State of Mississippi

APPENDIX 1

SENATE

MISSISSIPPI
EMPLOYMENT SECURITY COMMISSION



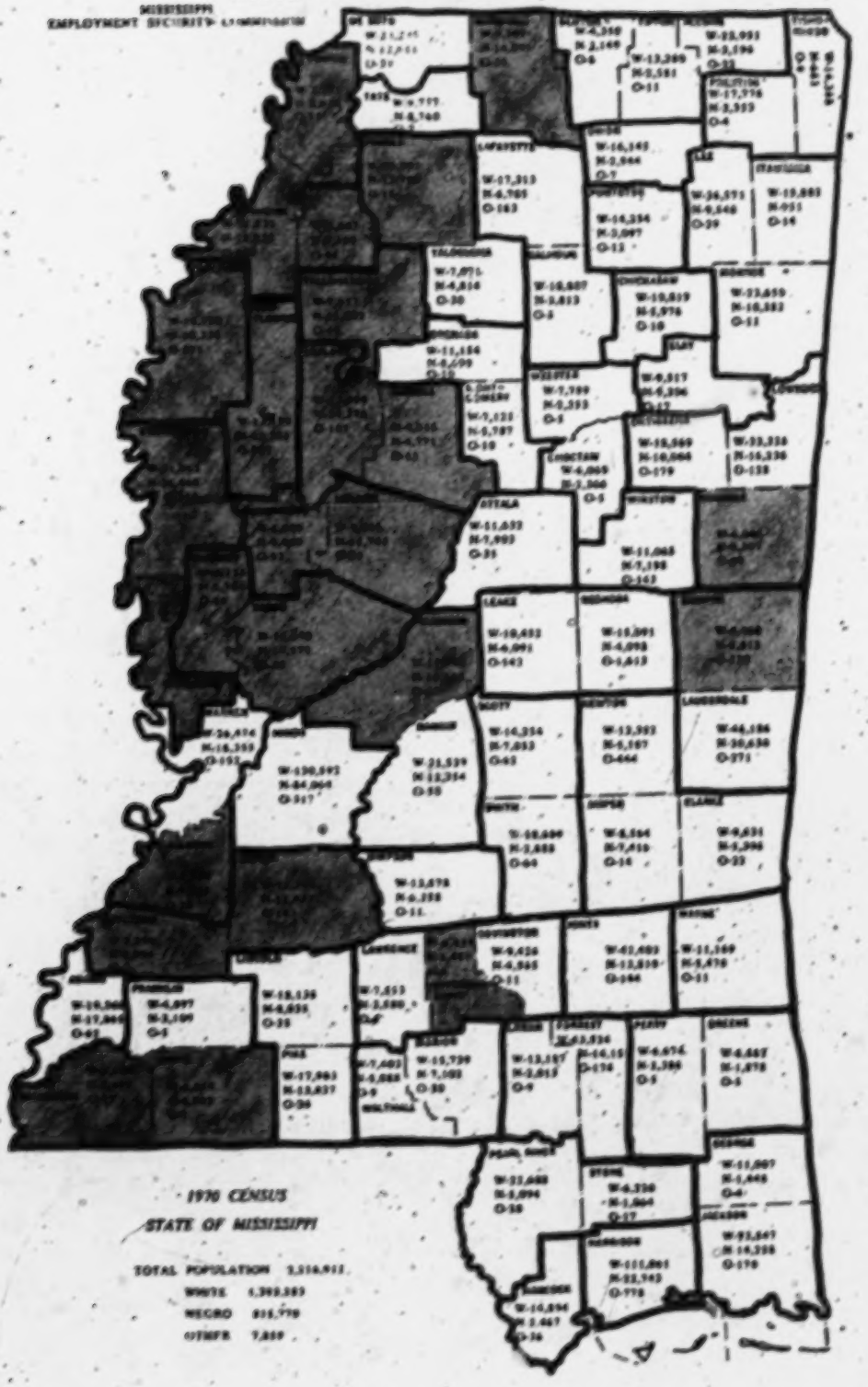
1970 CENSUS

STATE OF MISSISSIPPI

TOTAL POPULATION	2,216,911
WHITE	1,398,783
NEGRO	815,770
OTHER	2,359

APPENDIX 2

HOUSE OF REPRESENTATIVES



APPENDIX 3

I UPPER MISS. RIVER SYSTEM
II LOWER MISS. RIVER SYSTEM
III AMITE RIVER SYSTEM
IV TANGIPAHOA RIVER SYSTEM
V PEARL RIVER SYSTEM
VI JORDAN RIVER SYSTEM
VII WOLF RIVER SYSTEM
VIII BILOXI RIVER SYSTEM
IX TOMBIGBEE RIVER SYSTEM
X LEAF RIVER SYSTEM
XI CHICKASAWHAY RIVER SYSTEM
XII PASCAGOULA RIVER SYSTEM
XIII TOMBIGBEE RIVER SYSTEM
XIV TENNESSEE RIVER SYSTEM

APPENDIX 4

SENATE

I UPPER MISS. RIVER SYSTEM
II LOWER MISS. RIVER SYSTEM
III WHITE RIVER SYSTEM
IV TANGIPAHOA RIVER SYSTEM
V PEARL RIVER SYSTEM
VI JORDAN RIVER SYSTEM
VII WOLF RIVER SYSTEM
VIII BILOXI RIVER SYSTEM
IX TOMBIGBEE RIVER SYSTEM
X LEAF RIVER SYSTEM
XI CHICKASAWHAY RIVER SYSTEM
XII PASCAGOULA RIVER SYSTEM
XIII TOMBIGBEE RIVER SYSTEM
XIV TENNESSEE RIVER SYSTEM

CONNOR ET AL. v. WILLIAMS, GOVERNOR OF MISSISSIPPI, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

No. 71-221. Decided January 24, 1972

Appellants challenge a federal court-ordered reapportionment plan for the 1971 elections of Mississippi state legislators, which permitted a total variance of approximately 19% between the largest and smallest House and Senate districts. The court plan also provided for temporary multi-member districts to fill about one-fifth of the seats in 1971, but ordered the appointment of a Special Master in January 1972 to determine the feasibility of dividing these into equal-population districts for the 1975 and 1979 elections. *Held:*

1. Even if it be assumed that congressional redistricting decisions of this Court, which appellants rely on, are controlling here, it does not follow that the 1971 elections should be invalidated, and in the circumstances of this case those elections will not be disturbed.

2. Further consideration is inappropriate until completion of the proceedings to consider creation of single-member districts. 330 F. Supp. 506, vacated in part, and remanded.

PER CURIAM.

After determining that the reapportionment plan for the State Senate and House of Representatives, passed by the Mississippi Legislature in January 1971, failed to comply with the Equal Protection Clause because of a total variance of 26% between the largest and the smallest senatorial district (a determination that was not appealed),[1] the District Court fashioned its own plan for

[1] A three-judge court has twice previously voided apportionment plans enacted by the Mississippi Legislature because they embodied impermissible population variances. *Connor* v. *Johnson*, 279 F. Supp. 619 (SD Miss. 1966), aff'd, 386 U. S. 483 (1967) (appeal limited to congressional districting). This Court has already considered an interlocutory appeal in the instant case. *Connor* v. *Johnson*, 402 U. S. 690, 403 U. S. 928 (1971).

the quadrennial elections for both Houses scheduled for 1971, and these elections were held under the court's plan. *Connor* v. *Johnson*, 330 F. Supp. 506 (SD Miss. 1971). Appellants now challenge the constitutionality of the court's plan, contending that a total variance of 18.9% between the largest and smallest Senate district and one of 19.7% between the largest and smallest House district require that the court's districting plan be voided, a new plan instituted, and new elections held.[2]

Appellants rely on our recent cases invalidating congressional redistricting statutes that contained total variations of 5.97%, *Kirkpatrick* v. *Preisler*, 394 U. S. 526 (1969), and of 13.1%, *Wells* v. *Rockefeller*, 394 U. S. 542 (1969), between the largest and the smallest districts. These decisions do not squarely control the instant appeal since they do not concern state legislative apportionment, but they do raise substantial questions concerning the constitutionality of the District Court's plan as a design for permanent apportionment.

But conceding, *arguendo*, that the District Court's plan does not precisely square with Fourteenth Amendment requirements, it does not necessarily follow that the 1971 elections must be invalidated and new elections ordered. *Mann* v. *Davis*, 238 F. Supp. 458 (ED Va. 1964), aff'd *sub nom. Hughes* v. *WMCA*, 379 U. S. 694 (1965); *Toombs* v. *Fortson*, 241 F. Supp. 65, 71 (ND Ga. 1965), aff'd, 384 U. S. 210 (1966); *Drum* v. *Seawell*, 249 F. Supp.

[2] There are 52 seats in the State Senate and 122 seats in the State House of Representatives. According to the 1970 census, Mississippi has a population of 2,216,912, making the ideal single-member Senate district one containing 42,633 persons and the ideal single-member House district one containing 18,171 persons. Under the court's plan, Senate district 29 (46,719 persons, one Senator) is 9.6% underrepresented, and district 19 (77,320 persons, two Senators) is 9.3% overrepresented. House district 18 (32,772 persons, two Representatives) is 9.8% overrepresented, and House district 3 (59,912 persons, three Representatives) is 9.9% underrepresented.

877, 881–882 (MDNC 1965), aff'd, 383 U. S. 831 (1966). In the circumstances of this case, we decline to disturb these elections.

The prospective validity of the plan for the 1975 elections, absent legislative action, poses different issues, but we need not decide those questions at the present time. Under the District Court plan, approximately one-fifth of the seats in both Houses were filled by at-large elections from temporary countywide districts in 1971.[3] The District Court retained jurisdiction over these three counties and ordered that a Special Master be appointed in January 1972 to "take testimony and make findings as to whether the Counties of Hinds, Harrison, and Jackson may feasibly be divided into districts of substantially equal numbers in population for the elections of 1975 and 1979." 330 F. Supp., at 519. Such proceedings should go forward and be promptly concluded, for, as this Court has emphasized, "when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter." *Connor* v. *Johnson*, 402 U. S. 690, 692 (1971). Pending completion of those proceedings, we deem it inappropriate to give further consideration to this case. If we are to consider the applicability of *Preisler* and *Wells* to state legislative districts, it would be preferable to have before us a final judgment with respect to the

[3] Legislators elected from temporary multi-member districts:

	Senators	*Representatives*
Hinds County	5	12
Harrison County	3	7
Jackson County	2	6*
	10	25

*With George County.

Thus, 10 out of 52 Senators (19%) and 25 out of 122 Representatives (21%) were elected from temporary multi-member districts in 1971.

entire State.[4] To accomplish this result and to preserve the right to appeal from such a judgment, the judgment of the District Court is vacated, except insofar as it applied to the 1971 elections, and the case is remanded to the District Court for further proceedings consistent with this opinion.

So ordered.

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[4] Meanwhile, it is possible that the state legislature will adopt a plan of its own. During the course of this litigation, the District Court has emphasized that "the exercise of this unavoidable judicial duty [drafting an apportionment plan] cannot, *does not, and will not in any way tie the hands of the Legislature at any time* to adopt and enact any plan of its own for the reapportionment of its membership so long as it complies with Constitutional requirements." *Connor* v. *Johnson*, 265 F. Supp. 492, 494 (SD Miss. 1967) (emphasis in original). This Court has frequently emphasized that "legislative reapportionment is primarily a matter for legislative consideration and determination, and . . . judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." *Reynolds* v. *Sims*, 377 U. S. 533, 586 (1964). See also *Burns* v. *Richardson*, 384 U. S. 73, 85 (1966); *Ely* v. *Klahr*, 403 U. S. 108, 114 n. 6 (1971).